AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]
Updated May 25, 2005
(following the enactment of the REAL ID Act of 2005)

HOW TO FILE A PETITION FOR REVIEW

I. HIGHLIGHTS OF THIS ADVISORY

This Practice Advisory addresses the current procedures and general requirements for filing and litigating a petition for review. In addition, the advisory addresses the following fundamental points of which counsel should be aware when filing a petition for review:

* **Petitions for review must be filed no later than 30 days after the date of the decision of the Board of Immigration Appeals (BIA) or the United States Immigration and Customs Enforcement (ICE). This deadline is jurisdictional and, with limited exceptions, cannot be tolled. The petition for review must be received by the clerk's office on or before the thirtieth day and not merely mailed by that date.**

* **The 30-day deadline for filing a petition for review of the underlying decision is not extended by the filing of a motion to reopen or reconsider nor is it extended by the grant or extension of voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed.**

* **Filing a petition for review does not stay the individual's removal from the country.**

* **Filing a petition for review does not necessarily stay the individual's voluntary departure period.**

* **ICE can deport an individual before the 30-day deadline expires.**

---

[1]

* **If in doubt about whether the court of appeals has jurisdiction, it may be prudent to timely file the petition for review to preserve the individual's right to seek review**.

Sample petitions for review are attached as Appendices A and B. A copy of IIRIRA § 309 is attached as Appendix C. A list of websites for the courts of appeals is attached as Appendix D. A list of national addresses for service of the petition is attached as Appendix E. An unofficial "redlined" version of INA § 242, that is, showing the amendments made by the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005) is located at: www.ailf.org/lac/lac_realidresources.htm. The information in this document is current as the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

II. BACKGROUND AND INTRODUCTION

A petition for review is the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals. In the immigration context, a petition for review is commonly filed to obtain review of a decision of deportation, exclusion, or removal issued by the Board of Immigration Appeals (BIA). In addition, a petition for review may be filed to obtain review of a removal order issued by the United States Immigration and Customs Enforcement (ICE) under certain provisions of the Immigration and Nationality Act (INA).

Through the enactment of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress eliminated the distinction between deportation and exclusion proceedings and combined them into a single "removal" proceeding. Judicial review of final removal orders, resulting from removal proceedings commenced after IIRIRA's effective date (April 1, 1997), is governed by INA § 242, 8 U.S.C. § 1252. On May 11, 2005, through the enactment of the REAL ID Act of 2005, Congress amended this provision. The REAL ID Act expands the jurisdiction of the courts of appeals to consider, on petition for review, certain issues previously precluded by IIRIRA. The courts of appeals now have jurisdiction to review all constitutional issues and questions of law related to a final order of removal, deportation or exclusion issued before, on, or after the enactment date. The REAL ID Act also purports to eliminate all review of final orders of removal, deportation or exclusion by habeas corpus. See generally, INA § 242 as amended by the REAL ID Act

Prior to the enactment of the REAL ID Act, judicial review of final deportation or exclusion orders, resulting from proceedings commenced before April 1997, was generally governed by transitional rules set forth in IIRIRA § 309. The REAL ID Act modified this rule, stating that petitions for review of orders of deportation or exclusion filed under the transitional rules "shall" be treated as if filed as a petition for review under new INA § 242 (as amended by REAL ID Act § 106(d)). A copy of IIRIRA § 309 is reprinted in Appendix C.

AILF has issued a practice advisory on the new judicial review provisions of the REAL ID Act. See "Judicial Review Provisions of the REAL ID Act" (May 12, 2005), located at www.ailf.org/lac/lac_pa_051205.pdf.

III. COURT OF APPEALS JURISDICTION OVER PETITIONS FOR REVIEW

Determining whether a circuit court possesses subject matter jurisdiction to review a decision or a particular issue often requires a complicated legal analysis. Such determinations also are highly dependent on constantly evolving case law. The amendments made by the REAL ID expand the scope of petition for review jurisdiction. In time, the courts will decide the extent of that jurisdiction.

This section is meant to illustrate the types of decisions that may be reviewed through a petition for review. It is not exhaustive and should not be substituted for independent legal research regarding governing case law.

The following are examples of the types of decisions that may be reviewed through a petition for review:

A BIA decision to:

* issue a final removal order, including an affirmance without opinion
* deny a motion to reconsider or a motion to reopen, or
* affirm an Immigration Judge's denial of an asylum application.

An order of removal issued by ICE under:

* INA § 241(a)(5), or
* INA § 238(b)

A challenge to a BIA or ICE decision may involve one or more of the following types of claims: legal, constitutional, factual, or discretionary. In general, legal claims assert that the BIA/ICE erroneously applied or interpreted the law (for example, the INA or the regulations); constitutional challenges assert that the BIA/ICE violated a constitutional right (for example, due process or equal protection); factual claims assert that certain findings of fact made by the BIA/ICE were erroneous; and discretionary claims assert the BIA/ICE reached the wrong conclusion when exercising discretion.

Whether a claim is reviewable in the court of appeals involves additional analysis. The first question to consider is whether the INA contains a bar to review related to the decision, nature of the claim, or the person bringing the challenge. For example, INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) bars review of determinations regarding whether an asylum application was timely filed within one year of arrival; INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) bars court of appeals review of expedited removal orders; INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) and IIRIRA § 309(c)(4)(E) bars review of certain discretionary judgments, and INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) and IIRIRA § 309(c)(4)(G) bar petitions for review filed by, or on behalf of, individuals found removable due to certain criminal offenses.

If, and only if, the INA contains a bar to review related to the decision, nature of the claim, or the person bringing the challenge, then the claim must present either a question of law or a constitutional claim for the court to have jurisdiction over the petition for review. The REAL ID

Act added new INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), which provides that the bars to judicial review do not apply if the petition for review raises a question of law or constitutional claim. Thus, under the REAL ID Act, a court of appeals has jurisdiction over a petition for review that raises constitutional issues or questions of law even in cases that otherwise would be barred.

In addition, courts should continue to retain jurisdiction to determine whether they have jurisdiction over the petition for review. AILF believes that this should be true even if the issues involve mixed questions of law and fact.

As discussed in Section IV, below, until the courts address the REAL ID Act amendments, and specifically which, if any, issues remain reviewable via habeas corpus, it is advisable to timely file a petition for review to preserve petitioner's right to seek review.[2]

IV. PETITION REQUIREMENTS

Filing Deadline – New Cases
A petition for review "must be filed not later than thirty days after the date of the final order" of removal or the final order of exclusion or deportation. See INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (removal orders); IIRIRA § 309(c)(4)(C) as amended by REAL ID § 106(d) (deportation and exclusion orders). Emphasis added.

The thirty-day deadline for filing a petition for review of the underlying decision is not extended by the filing of a motion to reopen or reconsider nor is it extended by the grant or extension of voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed. If separate petitions are not filed, the Court's review may be limited to the issues arising from the BIA decision for which review is sought. For example, if a petition for review of the BIA's decision denying a motion to reopen or reconsider has been filed but a petition for review of the BIA decision underlying the motion has *not* been filed, issues arising from the underlying BIA decision may not be preserved for review.

The deadline for filing a petition for review is "mandatory and jurisdictional" and is "not subject to equitable tolling" *Stone v. INS*, 514 U.S. 386, 405 (1995). Because the thirty-day deadline is jurisdictional, circuit courts lack authority to consider late-filed petitions for review.[3]

---

[2] AILF believes review of detention issues still is available in habeas corpus proceedings.

[3] There are very few situations in which a court might excuse a late-filed petition for review, for example: (1) where the court or the BIA provided misleading information as to the deadline for filing a petition for review; and (2) where the BIA failed to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel. For further information on these situations and potential remedies, see AILF's practice advisory entitled "Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court" April 20, 2005, located at www.ailf.org/lac/lac_pa_042005.pdf.

The thirty-day time period begins running from the date of the BIA's decision affirming the Immigration Judge. If the BIA denied a motion to reopen or reconsider, the thirty-day time period begins running from the date of the BIA decision denying the motion. In reinstatement cases under INA § 241(a)(5) or administrative deportation cases under INA § 238(b), the thirty-day deadline begins running from the date of the final ICE order.[4] The petition for review must be received by the clerk's office on or before the thirtieth day and not merely mailed by that date.

Where the thirty-day deadline has expired due to ineffective assistance of counsel, new counsel may consider filing a motion to reopen to the BIA (provided the motion is filed within the ninety day statutory time period for filing motions to reopen). Counsel may also consider filing a motion requesting that the BIA rescind and re-issue its decision to allow petitioner to seek judicial review.[5]

Filing Deadline – District court cases transferred pursuant to the REAL ID Act
The new law provides that district courts "shall" transfer habeas corpus petitions challenging a final order of removal that are pending in the district court on May 11, 2005 (the date that the REAL ID Act was enacted) to the court of appeals in which a petition for review could have been filed (i.e. the circuit having jurisdiction over the place the immigration judge completed proceedings). The REAL ID Act specifies that only habeas petitions that challenge final orders of deportation, exclusion, or removal (or the part of the habeas petition challenging such an order) should be transferred.

The courts of appeals must treat the transferred case as if it was filed as a petition for review, with one exception. The one exception is that the requirement that a petition for review must be filed within 30 days of the final removal order does not apply to these transferred cases. This means that a habeas petition challenging a final order that was pending in district court on May 11, 2005 will be transferred to the court of appeals even if the habeas petition was not filed within 30 days of the final removal order. However, the 30 day deadline continues to apply to all other petitions for review.

This potentially creates a serious problem for some individuals. Prior to the REAL ID Act, an individual barred from filing a petition for review might have been able to get review through a habeas corpus petition. For example, many individuals with criminal convictions were barred from filing a petition for review under INA § 242(a)(2)(C). However, these individuals previously could have filed a habeas corpus petition. There is no deadline for filing a habeas petition. There will be individuals who relied on pre-REAL ID Act law and thus will not have

---

[4] Pursuant to *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (rehearing pending), only immigration judges may make reinstatement determinations under INA § 241(a)(5). Presumably, the immigrations judge's decision may be appealed to the BIA. Thus, in the Ninth Circuit, the thirty-day clock should begin running from the date of the BIA's decision.

[5] For further information regarding motions to rescind and reissue, see AILF's practice advisories entitled "Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court" (April 20, 2005) and "Judicial Review Provisions of the REAL ID Act: Strategies For Dealing With The Expansion Of Jurisdiction In The Court Of Appeals (May 20, 2005), both located on AILF's webpage at www.ailf.org/lac/lac_index.asp.

filed a petition for review within 30 days of their final order. If they did not have a habeas petition pending on May 11, 2005, they may be unable to have their cases transferred to the court of appeals pursuant to the REAL ID Act's transfer provision. Thus, these individuals conceivably could be barred from any federal court review under the REAL ID Act: they will no longer be able to file a habeas petition and will have missed the thirty-day deadline for filing a petition for review. AILF has issued a practice advisory with administrative suggestions for people in this situation. See "Judicial Review Provisions of the REAL ID Act: Strategies For Dealing With The Expansion Of Jurisdiction In The Court Of Appeals (May 20, 2005), located at www.ailf.org/lac/lac_pa_realid2_052005.pdf. AILF is also exploring federal court arguments. If you have a client in this situation, please contact realidcourts@ailf.org.

Attachments and Contents

Under INA § 242(c), 8 U.S.C. § 1252(c), a petition for review must and need only: (1) include a copy of the final administrative order; and (2) state whether any court has upheld the validity of the order, and if so, state which court, the date of the court's ruling, and the type of proceeding.

The petition should state the name of each individual petitioning for review and should not use "et al." to reference more than one petitioner. Federal Rule of Appellate Procedure (FRAP) 15(a)(2)(A). For example, where a family is in immigration proceedings but the BIA decision only references the lead respondent, the petition for review should name each family member whose case was decided by that order, even if not specifically mentioned in the order.

A sample petition for review is attached as Appendix A. Although it is not necessary at this stage to discuss the jurisdictional basis or merits of the petition a more detailed sample petition for review, containing the basis for jurisdiction and venue, is also provided as a reference and is attached as Appendix B.

V. STAY OF REMOVAL AND STAY OF VOLUNTARY DEPARTURE

The Immigration and Customs Enforcement (ICE) can deport petitioner before the 30-day deadline for filing a petition for review has run.

ICE may deport an individual as soon as the BIA issues its order. In reinstatement cases under INA § 241(a)(5) and administrative removal cases under INA § 238(b), deportation may occur as soon as ICE issues its removal order. In the post-AEDPA and IIRIRA era, serving the petition for review does not stay deportation, "unless the court orders otherwise." Compare former INA § 1106(a)(3), 8 U.S.C. § 1105a(a)(3) with INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) and IIRIRA § 309(c)(4)(F). Thus, petitioner also may want to file for a stay of the removal order pending the petition for review. The court must grant the stay request to prevent petitioner's removal from the country.

The varying circuit standards for, and strategic pros and cons of, applying for a stay of removal are discussed in greater detail in AILF's October 2004 Practice Advisory entitled, *Applying for a Stay of Removal in Federal Court Proceedings* (www.ailf.org/lac/lac_pa_102504.pdf).

In addition to requesting a stay of removal, the petitioner also may need to file a motion for stay of the voluntary departure period. In most circuits, the voluntary departure period begins to run from the date that the BIA issues its decision. If the petitioner remains in the United States past the departure date, he or she may lose the opportunity to depart voluntarily and may become ineligible for various forms of relief from removal for a period of ten years. See INA § 240B(d), 8 U.S.C. § 1229c(d). A motion for a stay of the voluntary departure period may need to be filed before the voluntary departure period expires.

The law regarding how to protect voluntary departure while the petition for review is pending is unsettled in many circuits; in fact, there are many pending cases that will address this issue. Attorneys are advised to review AILF's Practice Advisories on this topic (www.ailf.org/lac/lac_pa_092604.pdf) and to independently confirm whether the law in their circuit has changed since the date of that advisory.

VI. WHERE TO FILE THE PETITION FOR REVIEW

Venue is restricted to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); IIRIRA § 309(c)(4)(D). This requirement imposes a special hardship on individuals who are ordered removed while detained at detention centers in remote locations where counsel is often limited or unavailable.

VII. FILING FEE

The filing fee for a petition for review is usually $250, but counsel should check local court rules to verify the fee amount. A list of web addresses for the U.S. courts of appeals is attached in Appendix D and can also be located at www.uscourts.gov. Petitioner may request leave to proceed *in forma pauperis* by filing a motion and supporting affidavit with the court. See FRAP 24(b) and corresponding local circuit rules.

VIII. SERVICE ON RESPONDENT

Whom to Sue

Through the enactment of IIRIRA § 306(a)(2), Congress changed the designated respondent in a petition for review from the Immigration and Naturalization Service (INS) to the Attorney General. *Compare* former INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) *with* INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A). Therefore, in *removal* cases, the respondent is the Attorney General, Alberto Gonzales.

Judicial review of *deportation and exclusion* cases is governed by IIRIRA's transitional rules. Because the REAL ID Act provides that petitions for review in transitional rule cases shall be treated as if filed under INA § 242 as amended by the new law, the Attorney General should be named as the respondent. See REAL ID § 106(d), As INA § 242(b)(3)(A) provides that the respondent is the Attorney General in removal cases, the provision should also apply in transitional rule cases. Thus, in deportation and removal cases, the respondent is also the Attorney General, Alberto Gonzales.

Whom to Serve
The petition must be served "on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered." INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).[6]

Serve the Attorney General by sending a complete copy of the petition for review to the address set forth in Appendix E. Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Attorney General with one exception.[7] Thus, it is advisable to also serve a copy of the petition on OIL at the address listed in Appendix E. After receiving a copy of the petition, the OIL attorneys assigned to the case will usually enter their appearance before the court by letter and should inform petitioner's counsel.

To serve the officer in charge of the district, counsel should serve the ICE Field Office Director for Detention and Removal with jurisdiction over the district where the final administrative order was issued. Counsel may need to make inquires to learn the name of the officer in charge of detention and removal in their area. Counsel will also need to ascertain the proper mailing address for the ICE Field Office Director in order to serve this official.

At the same time, petitioner must file a certificate of service listing the names and addresses of those served and the manner of service. Federal Rules of Appellate Procedure (FRAP) 15(c). Addresses for the Attorney General and the Office of Immigration Litigation is attached as Appendix E. Because local ICE office addresses are subject to change, there is no list of these addresses attached. Instead, counsel will need to contact the local ICE office to get the correct address. FRAP 15(c) further requires that petitioner must give "the clerk enough copies of the petition . . . to serve each respondent." Presumably, an original plus one copy of the petition must be filed where the Attorney General is the only named respondent. However, counsel should verify the number of copies required by checking local procedures or contacting the clerk's office. *See also* FRAP 25 (Filing and Service) and corresponding local court rules.

Service of Future Pleadings
After opposing counsel has entered their appearance, future pleadings "must be made on the party's counsel" by a prescribed method. FRAP 25(b)&(c). Such pleadings must be filed with either (1) an acknowledgement of service by the person served, or (2) a statement by the person effectuating service attesting to the date and manner of service, the names of those served, and the appropriate mail, email or delivery address or facsimile number, depending on the manner of service. The proof of service may appear on or be affixed to the pleading. See FRAP 25(d)(3). The local rules set out acceptable methods of service. A list of websites for the courts of appeals is attached as Appendix D.

---

[6] If the order of removal was entered under another section of law, for example, INA §§ 238(b) or 241(a)(5), counsel presumably is still bound by the service requirements of INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).

[7] In the Second Circuit, Assistant US Attorneys handle petitions for review.

IX. LITIGATING THE PETITION IN THE COURT OF APPEALS

Admission and Entry of Appearance
Attorneys must be admitted to practice before the court of appeals in which the petition for review is filed or, in some courts, must file an application for admission either simultaneously or within a proscribed time period. Some courts allow an attorney who is not admitted to appear pro hac vice or, if appointed, to represent a petitioner proceeding in forma pauperis.

Virtually all courts of appeals require counsel to enter an appearance in each case. Entry of Appearance forms are generally available on the court's website and from the clerk's office.

For further information regarding admission and appearance requirements, counsel should consult FRAP 46 and corresponding local circuit rules. Information is also available on court websites. *See* Appendix D, listing websites for the courts of appeals.

Federal Rules of Appellate Procedure
The rules and procedure for litigation in the courts of appeals are governed by the Federal Rules of Appellate Procedure in conjunction with each circuit's local rules. This advisory provides a brief overview of appellate procedure related to petition for review litigation, however, it does not address all of the Federal Rules of Appellate Procedure nor does it address local circuit rules.

Once a petition for review is filed, the court generally issues an order/schedule for the parties to file the Certified Record of Proceedings (also known as the "Administrative Record"), Petitioner's Opening Brief (and possibly Excerpts of Record), Respondent's Answering Brief (and possibly Excerpt of Record), and Petitioner's Reply Brief (optional).

Certified Record of Proceedings
The agency is obligated to file the Certified Record of Proceeding (also called the Certified Administrative Record), within 40 days of service of the petition for review. FRAP 17(a). The record must include (1) the order involved; (2) any findings or report on which it is based; and (3) pleadings, evidence, and other parts of the proceeding before the agency, including the transcripts of hearings. FRAP 16(a). Where the petition seeks review of a BIA order, the record is prepared by the Executive Office for Immigration Review and filed by OIL.

Supplemental Authorities – 28(j) Letters
If pertinent and significant authorities come to petitioner's attention after briefing is completed or after oral argument but before the court issues a decision, counsel should advise the court of the supplemental citations pursuant to FRAP 28(j). The advisal is made by letter and copied to opposing counsel. "The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." FRAP 28(j).

Oral Argument
Pursuant to FRAP 34, any party may file, or a court may require by local rule, a statement explaining why an oral argument should, or need not, be permitted. Oral arguments must be permitted unless a panel of three judges decides that:

(1) the appeal is frivolous;
(2) the dispositive issue(s) have already been decided; or
(3) the facts and arguments are adequately presented in the briefs and records.

The court clerk will notify the parties of the date, time, place, and time allotted for argument if the court determines oral argument is necessary.

Judgment and Post-Judgment Review Timing
The judgment (or decision) is entered on the docket by the clerk after he or she receives the court's opinion or upon the court's instruction (where judgment is rendered without opinion). FRAP 36 (Entry of Judgment). A petition for rehearing or petition for rehearing en banc may be filed within 45 days after entry of judgment, unless otherwise specified by the court or local rule. FRAP 35 (En Banc Determination) and 40 FRAP (Petition for Panel Rehearing). Unless the court directs otherwise, the mandate will automatically issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41.

Briefing Schedule
INA § 242(b)(3)(C), 8 U.S.C. § 1252(b)(3)(C) states that petitioner must serve and file the opening brief no later than forty days after the date on which the administrative record is available, and further states that petitioner may serve and file a reply brief within fourteen days after service of the government's brief. *See also* FRAP 31(a)(1) ("The appellant must serve and file a brief within 40 days after the record is filed."). The statute and rule say these deadlines may only be extended by motion upon a showing of good cause. INA § 242(b)(3)(C), FRAP 31(a)(1). Also, if the brief is not filed, INA § 242(b)(3)(C) instructs courts to dismiss the appeal unless a manifest injustice would result.

Most courts do not rely on the time frame in the statute or rule, but rather issue a schedule setting out due dates for the filing of both the administrative record and the briefs. Further, it is common for counsel on either side or both sides to move to extend the briefing schedule or move to hold briefing in abeyance. Written motions are governed by FRAP 27 and corresponding local rules. Some courts also allow telephonic motions for an extension of time to file a brief.

Some confusion may arise if the government fails to timely file the administrative record, the court has not issued a new schedule reflecting a later due date for petitioner's opening brief and the brief due date is approaching. Although arguably the due date for petitioner's opening brief should automatically be postponed in this situation (by operation of INA § 242(b)(3)(C) and FRAP 31(a)(a)), the courts operate under their own briefing schedules. Petitioner will be well advised to move for an extension of the briefing schedule on the basis that the administrative record has not been filed, citing the statute and the rule. The court should grant the motion and set a new briefing deadline.

However, the courts rarely but occasionally have denied such a motion and have required petitioners to file an opening brief without the administrative record. In this event, petitioner

should comply with the court's order and timely file the opening brief. If counsel has all or some of the record below (perhaps as a result of prior representation or a Freedom of Information Act Request), petitioner should include an appendix with the relevant portions of the record accompanied by a motion for leave to file those portions and should cite to the improvised record in the opening brief. Counsel could object, either in the brief or in an accompanying pleading, that the court's requiring the opening brief to be filed without the administrative record infringes on petitioner's right to appeal, as counsel cannot adequately present an appeal without access to the complete record below. Counsel also might move to file a supplemental or corrected brief, if necessary, after the administrative record is filed.

In addition, the briefing schedule may be delayed or vacated if the government files a motion to dismiss for lack of subject matter jurisdiction claiming that petitioner is barred from direct review in the court of appeals (under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) or IIRIRA § 309(c)(4)).

When filing briefs in the circuit courts, counsel should consult FRAP 28 (Briefs), 30 (Appendix to the Briefs), 31 (Serving and Filing), and 32 (Form of Briefs, Appendices, and Other Papers) as well as all corresponding local rules. A list of websites for the courts of appeals is attached as Appendix D.

APPENDIX A: SAMPLE PETITION FOR REVIEW

Notes:
1. Complete ALL underlined spaces (except "Case File No.") as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk's Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n.4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, and rules regarding admission and entry of appearance as counsel.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	
Petitioner,	**Case File No._____**
v.	**Immigration File No.: A_____**
Alberto GONZALES, Attorney General,	
Respondent .	**PETITION FOR REVIEW**

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court's ruling, and the kind of proceeding).

Dated: _____ Respectfully submitted,

_____
Attorney/s Name
Firm / Organization
Address

Telephone:
Facsimile:
Attorney/s for Petitioner

APPENDIX B: SAMPLE PETITION FOR REVIEW (MORE DETAILED)

Notes:
1. Complete ALL underlined spaces (except "Case File No.") as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk's Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n. 4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, and rules regarding admission and entry of appearance as counsel.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	)	
	)	
Petitioner,	)	**Case File No._____**
	)	
v.	)	
	)	**Immigration File No.: A_____**
Alberto **GONZALES,**	)	
Attorney General,	)	
	)	**PETITION FOR REVIEW**
Respondent .	)	
_____	)	

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court's ruling, and the kind of proceeding).

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1) (removal cases) / § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by § 106 of the REAL ID Act of 2005 (deportation and exclusion cases).

Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) (removal cases) / IIRIRA § 309(c)(4)(D) (deportation/exclusion cases) because the immigration judge / ICE (in cases under INA §§ 241(a)(5) or 238(b)) completed proceedings in City, State, within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) (removal) / IIRIRA § 309(c)(4)(C) (deportation / exclusion) as it is filed within 30 days of the final order of removal / deportation / exclusion.

Dated: _____

Respectfully submitted,

_____
Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:

Attorney/s for Petitioner

APPENDIX C: TRANSITIONAL RULES

NOTE: The transitional rules set forth in former INA § 106(a)(1995) and IIRIRA § 309 (below) must be read in conjunction with § 106(d) of the REAL ID Act of 2005, which provides:

(d) Transitional Rule Cases. A petition for review filed under former INA § 106 of the Immigration and Nationality Act (as in effected before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1252 note) shall be treated as if filed as a petition for review under 242 of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section. Notwithstanding any other provision of law, (statutory or nonstatutory), including section 2241 of Title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion."

IIRIRA § 309

Effective Dates; Transition.
(a) In General.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

(b) Promulgation of Regulations.-The Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date.

(c) Transition for Aliens in Proceedings.-
(1) General rule that new rules do not apply.-Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date-

(A) the amendments made by this subtitle shall not apply, and
(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) Attorney General option to elect to apply new procedures.-In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) Attorney General option to terminate and reinitiate proceedings.-In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) Transitional changes in judicial review.-In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary-

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

APPENDIX D: WEBSITES FOR U.S. COURTS OF APPEALS

First Circuit: www.ca1.uscourts.gov

Second Circuit: www.ca2.uscourts.gov

Third Circuit: www.ca3.uscourts.gov

Fourth Circuit: www.ca4.uscourts.gov

Fifth Circuit: www.ca5.uscourts.gov

Sixth Circuit: www.ca6.uscourts.gov

Seventh Circuit: www.ca7.uscourts.gov

Eighth Circuit: www.ca8.uscourts.gov

Ninth Circuit: www.ca9.uscourts.gov

Tenth Circuit: www.ca10.uscourts.gov

Eleventh Circuit: www.ca11.uscourts.gov

DC Circuit: www.cadc.uscourts.gov

APPENDIX E: LIST OF ADDRESSES FOR SERVICE OF A PETITION FOR REVIEW

Attorney General

Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of Immigration Litigation

Thomas W. Hussey, Director
Office of Immigration Litigation
U.S. Department of Justice / Civil Division
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ICE District Offices

Service must also be made on the Field Office Director or, where none exists, the most senior officer in the Detention & Removal Unit. Counsel will need to contact the local ICE office to obtain the name and position title of the appropriate local officer and to obtain the mailing address for service on this individual.